United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7614

To be signed by
DAVID GREENE

In The

United States Court of Appeals

For The Second Circuit

KENIL K. GOSS,

Plaintiff-Appellant,

vs.

REVLON, INC. and its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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Docket No. 76-7614

KENIL K. GOSS,

Plaintiff-Appellant,

-against-

REVLON, INC. and ITS WHOLLY OWNED SUBSIDIARY, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT AND ISSUES PRESENTED

In Kenil K. Goss v. Revlon, Inc., Docket Nos. 76-7015 and 76-7065, decided October 29, 1976, this Court, in a per curiam opinion, decided an appeal by plaintiff herein from an order of the U.S. District Court for the Southern District

of New York (Honorable Richard Owen) dismissing plaintiff's complaint alleging employment discrimination under the Civil Rights Act of 1964, 42 USC Sec. 2000 e et seq. The dismissal of plaintiff's complaint was affirmed. Plaintiff had also sought leave to amend to add new causes of action, among others, under the Civil Rights Act of 1866, 42 USC Sec. 1981. This Court held that the district court failed to rule on that motion and the case was remanded for a determination of plaintiff's motion for leave to amend.

Upon remand, the United States District Court for the Southern District of New York (Honorable Richard Owen) denied plaintiff's motion for leave to amend nunc pro tunc. Judge Owen stated that said motion had been denied sub silentio in granting defendants' cross-motion to dismiss.

Plaintiff has appealed from the order of Judge Owen, denying his motion for leave to amend.

The District Court did not abuse its discretion when it denied plaintiff's motion for leave to amend, since plaintiff moved almost two years after filing his complaint and sought to add myriad new claims and advanced no reason for his extended and undue delay, other than ignorance of the law.

This Court has already determined that "denial of leave to amend in this case would not be an abuse of discretion,"

Goss v. Revlon, Inc., Supra. Plaintiff cannot relitigate the same issue which has previously been decided by this Court.

Plaintiff's petition for rehearing was denied by the Court on December 20, 1976.

STATEMENT OF FACTS

Plaintiff has set forth facts for which there is no support in the record. His recital is not only without such support; it is totally distorted. A fair and accurate presentation is necessary.

The summons and complaint were served on defendants on or about December 18, 1973. On or about January 7, 1974, defendants, by their attorneys answered the complaint. Defendants served a notice of oral deposition to commence on February 4, 1974. A pre-trial conference was scheduled for January 31, 1974 at which time plaintiff requested additional time to obtain legal counsel. The depositions were adjourned at plaintiff's request until May 22, 1974. At a second pre-trial conference on March 29, 1974, Judge Owen tentatively fixed a trial date for June 17, 1974. At that time he advised both sides that they would have the opportunity to submit trial memoranda. Since plaintiff's obstruction of discovery resulted in numerous motions, the trial date in June of 1974 was indefinitely postponed.

On May 30, 1974, defendants filed a motion to compel plaintiff to produce for inspection a certain 63 page statement referred to in his complaint and theretofore submitted by

him to EEOC. Plaintiff did not produce that 63 page statement until October 7, 1974, pursuant to court direction.

On October 9, 1974 defendants served a request for production of certain documents which were mentioned in the aforesaid 63 page statement. Plaintiff refused to produce such documents.

On November 11, 1974 defendants moved to compel production of such documents. On December 6, 1974 Magistrate Raby rendered a report recommending that plaintiff be directed to make available photocopies of the requested documents within 30 days. Plaintiff failed and refused to comply although thereafter requested in writing by defendants on January 15, 1975.

On April 18, 1975, defendants moved to dismiss the complaint because of plaintiff's failure to comply with the court order directing production. Judge Owen conditionally granted said motion unless plaintiff produced the documents within 10 days. Judge Owen, pursuant to defendant's prayer for relief, awarded costs in the sum of $50 to defendants. This is the "arbitrary fine" to which plaintiff continually refers. Plaintiff finally produced the requested documents on June 11, 1975.

It is clear that any delay was solely occasioned by plaintiff himself who determined that he would not voluntarily comply with discovery procedures. In fact, he never complied

because, on November 7, 1975 during the argument of the motion for summary judgment, he referred to certain "secret documents" in his possession. Judge Owen ordered plaintiff to deliver such documents to defendants' attorneys. Accordingly, plaintiff delayed for about two years before producing documents which he admittedly removed from defendants' premises without authorization while still employed. Plaintiff's detailed recital of defendant's alleged dilatory tactics is false.

There was no untimeliness on defendants' part. No trial memorandum was required since there was no trial. Defendants' cross-motion for summary judgment was timely in all respects. Plaintiff, on the other hand, delayed inexcusably in every aspect of his conduct in this litigation.

Plaintiff contends that he first became aware of his rights under the Civil Rights Act of 1866 on March 29, 1974. He further states that he asserted his claim in his motion of August 8, 1974. Plaintiff's motion of August 8, 1974 was merely a recital of his objections to the Magistrate's Report on a discovery motion filed by defendants and contains the now familiar rhetoric of bias and prejudice on the part of the Magistrate.

Plaintiff states that, at a pre-trial conference on September 27, 1974, he sought leave to submit his amended complaint and Judge Owen replied "I can't rule on that until I see it." (Page 13). Accordingly, even though he knew that

Judge Owen would not rule on his request until he submitted a proposed amended complaint, plaintiff did not submit his amended complaint until September 22, 1975, - almost one year later.

It is not correct that defendants failed to oppose plaintiff's motion for leave to submit an amended complaint. There was no reason for opposition until plaintiff submitted his proposed amended complaint on September 22, 1975. Defendants thereafter did oppose that motion and did request that leave to amend be denied. (Affidavit in Opposition, October 10, 1975).

Plaintiff contends that he moved on four occasions to amend his complaint - August 8, 1974, August 28, 1974, September 16, 1974 and July 7, 1975. (Page 5).

On August 8, 1974, plaintiff objected to the report of Magistrate Raby recommending production of a certain 63 page statement. On August 28, 1974, plaintiff submitted his "rebuttal to defendants' answer and defenses." On September 16, 1974, plaintiff moved to set aside the aforesaid report of Magistrate Raby. Plaintiff's motion "to submit an amended complaint" is dated July 7, 1975 but plaintiff conceded that it was not filed in Court until September 17, 1975 because his "sudden illness" prevented its mailing. (Page 13).

Plaintiff attempts to utilize his pro se status as justification for his wilful misconduct.

Plaintiff is not the ordinary pro se plaintiff without benefit of legal training. In his statement to EEOC, plaintiff set forth the following credentials: Bachelor of Commerce (B.Com.), Masters of Arts (M.A.) and Bachelor of Laws (LLB) from Calcutta University. He is also a New York State C.P.A., is studying for a Masters of Business Administration (M.B.A.) at New York University and is an applicant for the Bar Examination in New York State and for the Masters of Law (L.L.M.) Program at New York University. (Plaintiff's Affidavit in Opposition to Defendants' Cross Motion for Summary Judgment, Exhibit 3, Page 11).

Although plaintiff continuously characterizes himself as "a non-English speaking alien" and "a non-lawyer" without benefit of legal counsel, it is clear that plaintiff has extensive legal training, that he has received a law degree and that he is an applicant for a post graduate law degree program and for the Bar Examination of New York State. It is also clear that plaintiff considers himself "fluent" in English, that he has studied English for 15 years, has lived in English speaking countries for 40 years, and has excellent diction and is capable of winning many debates. (Plaintiff's Affidavit in Opposition, Exhibit 3, Page 12).

Plaintiff's impressive academic and educational credentials belie his claims of ignorance. The Record clearly establishes that he alone was responsible for the extended and undue delay.

Plaintiff's papers below and on this appeal are replete with scandalous and defamatory statements relating to defendants, their attorneys, Judge Owen and Magistrate Raby. Defendants are accused of perjury and their attorneys of subornation of perjury and possibly forgery. Magistrate Raby is accused of bias and prejudice, as is Judge Owen.

It is unfortunate that defendants must defend themselves against such outrageous charges in their appellate brief; however, it is time for the record to reflect the real facts therein.

POINT ONE

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, allowance of amendments lies in the discretion of the district court and the refusal to permit amendment is not subject to review on appeal except for abuse of discretion; Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795 (1971).

As stated in 3Moore's Federal Practice, 15.08(4), pages 896-900, "the more common reasons for denying leave to amend are that the amendment will result in undue prejudice to the other party, is unduly delayed, is not offered in good faith, or that the party has had sufficient opportunity to state a claim and has failed."

In Head v. Timken Roller Bearing Co., 486 F.2d 876 (6th Cir. 1973), plaintiffs, who had brought a timely action under Title VII alleging employment discrimination, were denied leave to amend to add a cause of action for employment discrimination under the Civil Rights Act of 1866, 42 U.S.C. 1981. Plaintiff sought leave on the grounds that they had become aware of the possibilities of Section 1981 only after filing the complaint. The Court upheld the denial of leave as an entirely proper exercise of discretion, Id at pp. 874-875.

In Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973), the district court denied plaintiff's motion to amend its pleadings to set forth an alternate theory of recovery based upon a modification of a license agreement.

The only excuse offered for the delayed amendment was that plaintiff misconceived the law. The Court held that it was not an abuse of discretion to deny the motion for leave to amend, since the case has been pending for more than 2-1/2 years and no reason is shown why plaintiff could not have presented its alternative theory initially, Id. p. 971.

Appellant contends that the district court abused its discretion by failing to state the reasons for its denial of his motion for leave to amend. In Komie v. Buehler Corporation, 449 F.2 644 (9th Cir. 1971), the Court held that the district court is not required to expressly state the reason for denying the motion to amend, especially where

the "justifying" reasons are readily apparent. Since the motion to amend had been made 31 months after the answer was filed, eleven months after the pre-trial statement was signed and more than six months after the case was set for trial, there were readily apparent reasons to justify denial of leave to amend.

In the present case, plaintiff instituted an action alleging employment discrimination under Title VII in December of 1973. In September of 1975 (almost two years later) he sought leave to amend to add several new causes of action, including class action status, and actions under the Age Discrimination in Employment Act, the Civil Rights Acts of 1866 and 1870 and the Thirteenth Amendment. Plaintiff offered no excuse for the delay, except the fact that he did not become aware of his rights until March of 1974. The reasons justifying denial of leave to amend were readily apparent.

POINT TWO

IN THE PRIOR APPEAL, THIS COURT RULED THAT DENIAL OF LEAVE TO AMEND WOULD NOT BE AN ABUSE OF DISCRETION.

In Goss v. Revlon, supra, this Court remanded the case to the district court for a determination of plaintiff's motion for leave to amend. Upon remand, the district court denied the motion for leave to amend nunc pro tunc.

In Goss, this Court stated that "while Rule 15(a) commands that such leave is to be freely given, denial of leave to amend in this case would not be an abuse of discretion. The appellant, in seeking to add myriad new claims, advances no reason for his extended and undue delay, other than ignorance of the law; such a failure has been held an insufficient basis for leave to amend." (Emphasis supplied).

Accordingly, this Court has already decided the issue of whether denial of leave to amend would constitute an abuse of discretion and that is the law of the case herein. As stated in 1B Moore's Federal Practice, Sec. 0.404(1), page 402, when a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decisis but as a general proposition, it establishes the law, which it itself will normally apply to the same issues in subsequent proceedings in that case.

As stated in White v. Murtha, 377 F2d 428, 431 (5th Cir. 1967):

> "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members' and that it would be impossible for an appellate court 'to perform its duties satisfactorily, and efficiently' and expeditiously'

> if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof.
>
> "While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on the subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."

None of the aforesaid factors is present. The Record before the District court upon remand is the same; no additional evidence has been offered. Plaintiff has not cited any controlling authority which now warrants a contrary decision. The prior decision cannot be deemed "clearly erroneous." In fact, plaintiff sets forth additional facts relating to his awareness of his rights and his undue delay which reinforce the correctness of the original decision.

In Feature Sports, Inc. v. United States, 374 F.2d 890, 891 (5th Cir. 1967) the Court applied the doctrine of the law of the case and stated:

> "Faithful to our very restrictive mandate to determine on the existing record whether, before the initial deposit with Bank German there was any contract between Feature Sports, Inc. and Johansson which provided for the delivery of the advances of $250,000 into an escrow account, Johannson v. United States,

5th Cir. 1964, 336 F.2d 809, 816, the Trial Judge did just that. With the ample articulation of the reasons leading to it, the Judge concluded and flatly declared that no such contract existed.

"That finding we earlier said, would be an end to the Taxpayer's case. 336 F.2d 809, 817.

"And so it does."

In Goss, supra, this Court's restrictive mandate - to determine the motion for leave to amend - was followed. The district court stated that it denied that motion nunc pro tunc. Accordingly, that ruling combined with the prior appellate finding that it would not constitute an abuse of discretion should put an end to this case. Plaintiff's obstinacy should not permit relitigation of the same issue.

CONCLUSION

The appeal should be dismissed, with costs.

Respectfully submitted,

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A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
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Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Eugene L. St. Louis, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1235 Plane Street, Union, New Jersey 07083. That on the **28th** *day of* **Feb** *19* **77** *deponent served the annexed*

Resp. Brief *upon* **Kenil K. Goss, Esqs.** *attorney(s) for*

in this action, at **21 Fairview Avenue**
Tuckahoe, N.Y. 10707

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this **28th**
day of **February,** *1977.*

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0478850
Qualified in New York County
Commission Expires March 30, 1977

Print name beneath signature
Eugene L. St. Louis